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No. 97-565

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ABEL BERNARD MEDINA, BENJAMIN TIBURICO TORRES and JESUS MANUAL CHAVEZ,
Petitioners,

vs.

EDWARD MILLER, individually and as an Agent for the State of California, Department of Justice, Bureau of Narcotics; COUNTY OF KERN, a political subdivision; EARLY BRAY, individually and as a Detective for the Kern County Sheriff's Department; JOHN LACERTOSO, individually and as a Sergeant for the Kern County Sheriff's Department; J.C. PLANK, individually and as a Deputy for the Kern County Sheriff's Department,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly upheld the District Court's decision, in spite of findings by a state appellate court that petitioners' arrests were illegal, not to preclude respondents from relitigating the legality of petitioners' arrests on the grounds that respondents state police officers did not have a fair opportunity to litigate that issue during the criminal proceedings, and that they were not in privity with the State of California simply by virtue of the officers working in concert with the prosecutor and testifying during the criminal proceedings?

2. Whether the Court of Appeals properly upheld the District Court's decision not to take judicial notice of the facts stated in the state court's unpublished opinion dismissing petitioners' criminal charges on the ground that they were not indisputably true?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE[1/]

On or about January 1991, a confidential informant advised respondent Ed Miller, an investigator with the California Department of justice, Bureau of Narcotics (hereinafter referred to as "Miller") that he knew petitioner Abel Bernard Medina (hereinafter referred to as "Medina") was involved in the manufacture of PCP at a ranch owned by Medina's parents in the Stallion Springs area of Southern California. At the time, Medina had a "no bail" warrant for a probation violation, issued on April 25, 1990, by Los Angeles County Superior Court.

On the morning of April 2, 1991, Miller was told by that same informant that Medina and three hispanic males had traveled, on or about March 31, 1991, to the elder Medina's ranch in Stallion Springs specifically to manufacture P.C.P., and that they had commuted in two vehicles, one of which was a gray van belonging to Medina. They intended to stay in Stallion Springs for a few days, and return to Los Angeles with the manufactured PCP.

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1. Petitioners' Statement of the Case contains many mistatements of fact. The limited record in the Court of Appeals did not include witnesses' testimony about the underlying facts of this litigation. What follows is a summary of the officers' testimony at trial.

On April 2, 1991, Investigator Bray of the Kern County Sheriff's Department, went to the elder Medina's ranch and saw two hispanic males talking in proximity of two parked vehicles, one of which was a gray colored van. The other was a white newer van. Respondents Miller, Bray and other members of the Sheriff's Department, established surveillance of the ranch.

On April 4, 1991, the white van was followed by a surveillance team to the city of Tehachapi, where respondent Miller followed some hispanic males into a hardware store. One of them matched the description of Abel Medina, but Miller could not identify him positively. Meanwhile, back at the ranch, Deputy Plank entered Medina's property by climbing over the gate. He walked up the dirt driveway toward the house and garage where he detected a chemical odor consistent with PCP. At no time prior to the petitioners' trial was Miller informed of Plank's trespass.

On April 4, 1991, Miller was awaken at 4:35 a.m. and told that the two vans had left Medina's ranch, and that they would be followed by the surveillance team. Miller left his hotel to join them, and finally caught up with the team as Deputies Yorke and Kane stopped the gray van, by order of Investigator Bray. Miller believed the gray van had been stopped on the suspicion that Medina was inside the vehicle. The gray van did contain Medina, as well as PCP and chemicals used to manufacture PCP. Shortly thereafter, the

white van was stopped. It too contained PCP and chemicals used to make PCP. The vans' passengers were all arrested on drug related charges, i.e., manufacturing, transporting, and/or possessing PCP.

During the petitioners' criminal trial, the prosecutor refrained from introducing in evidence most, if not all, of the information passed on to law enforcement by the confidential informant for fear of revealing his identity and endangering his life. Nevertheless, the jury found petitioners guilty of manufacturing, transporting, and/or possessing PCP. Petitioners appealed the verdict to the California Court of Appeal for the Fifth Appellate District, which, in an unpublished opinion, reversed petitioners' convictions on the grounds that the incursion of Deputy Plank onto the elder Medina's property was illegal, invalidating the petitioners' arrests, and that "even if Plank's information played no role in Bray's decision [to arrest petitioners]," there was no probable cause, on the basis of the limited evidence presented at trial by the prosecutor, to believe that Medina, wanted on an outstanding felony warrant, was in one of the vehicles stopped by the officers.

Thereafter, petitioners filed this section 1983 claim against respondents claiming that the officers violated their Fourth Amendment rights. At trial, petitioners sought to use their acquittal as a preclusive determination there was no probable cause for the officers' actions. Petitioners argued the issue of the respondents' liability should be resolved in their favor

and needed not be sent to the jury. The District Court, however, allowed the probable cause issue to be relitigated, ruling that collateral estoppel would be improper because there was no evidence that (1) respondents, who were not parties to the state criminal proceeding, either had control over or substantially participated in the control of the prosecutor's presentation of the case, and (2) respondents did have a fair opportunity to litigate the issue of probable cause during the criminal proceedings.

Also, petitioners argued that the District Court should take judicial notice of the truth of the facts stated in the unpublished state appellate opinion. The Court refused to do so. After hearing the evidence, the jury returned a verdict in favor of respondents.

The United States Court of Appeals for the Ninth Circuit upheld the District Court's rulings, holding that collateral estoppel would have been improper as there was no privity between the respondents and the parties in the criminal proceeding; the rules of law and burdens of proof in the criminal and civil cases were substantially different; and respondents did not have a fair opportunity to litigate the issue of probable cause during the criminal proceeding. Finally, the appellate court ruled that even if respondents' conduct had violated petitioners' rights, the jurors were entitled to find that respondents were shielded by qualified immunity because they reasonably believed that they were acting lawfully, and the jury in fact so found.

REASONS FOR DENYING THE WRIT

Petitioners misrepresent the parties and events involved in their arrests and subsequent prosecution, and misinterpret the applicable legal standards and rules. To grant this Petition would result in a miscarriage of justice.

A. Collateral Estoppel

Petitioners maintain that respondents were estopped from relitigating the legality of their arrests because there was privity between the prosecutor from the County of Kern, the Attorney General's Office, who handled the criminal appeal, and the respondents, who arrested them and testified at the criminal proceedings, because they were all agents of the State of California with the shared goal of convincting them. Petitioners' argument is flawed for several reasons.

Under California law[2], collateral estoppel precludes a party from relitigating issues litigated and decided in a prior proceeding. People v. Sims (1982) 32 Cal.3d 468, 477; Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd. (1962) 58 Cal.2d 601, 604. "Traditionally, [courts] have applied the doctrine only if several threshold requirements are fulfilled. First,

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2. A federal court applies the state law of preclusion when determining the preclusive effect of a state court decision. Migra v. Warren City School District Board of Education, 465 U.S. 75, 79 L. Ed. 2d 56, 104 S. Ct. 892 (1984).

the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding." Lucido v. Superior Court (1990) 51 Cal.3d 335, 341. Even if these threshold requirements are satisfied, the doctrine will not be applied if such application would not serve its underlying fundamental principles. Id. at 339.

Here, the final condition for the application of collateral estoppel was not met: respondent Miller was not a party, or in privity with, the party to the former proceeding. The State of California, not Miller, was a party to petitioners' criminal proceedings. Petitioners, however, argue that since respondent Miller is a state police officer and the State of California, in whose name the criminal action was instituted, was a party to the earlier criminal action, Miller should be treated the same as the State, and since the State would have been collaterally estopped, he should also be. Further, petitioners argue that since the California Attorney General's Office represented the State of California at the state appellate level, and represent respondent Miller here, Miller should be precluded from relitigating the probable cause issue.

While there is a simplistic attraction to petitioners' argument, nevertheless it must be rejected because a police officer, such as respondent Miller, is neither a party[3] nor in privity with the prosecuting entity in criminal proceedings. Likewise, a police officer does not not have a full and fair opportunity to litigate issues raised in criminal proceedings. Davis v. Eide, 439 F.2d 1077, 1078 (9th Cir. 1971) (where conviction was reversed, defendant police officers in Section 1983 case did not have privity with state during prior criminal proceeding for purposes of plaintiff's invoking collateral estoppel on the issue of lack of probable cause); Warren v. Byrne, 699 F.2d 95 (2d Cir.1983) (same); Duncan v. Clements, 744 F.2d 48 (8th Cir.1984) (same); Schwab v. Wood, 767 F. Supp. 574, 583 (D. Del. 1991) (collateral estoppel improper where police officers had no control over or substantially participated in the state's presentation of criminal case, the prosecutor represented the interests of the state and not the officers' in the criminal proceeding, and the officers had no opportunity to

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3. Moreover, petitioners' argument overlooks one essential fact. In their complaint, they allege that "all defendants are sued in their official and personal capacities." Respondent Miller is not only being sued in his capacity as a government employee, but is also being sued in his individual capacity. The mere fact that the California Attorney General's Office represented the State of California at the criminal proceedings and respondent Miller in this civil action does not establish that the State of California is the only litigant to this action. Rather, Miller, who is being sued in his own individual capacity, is also a separate and independent party in his own right.

engage in any discovery or assert any defense which could shield them from civil liability during the criminal proceeding); Griffin v. Strong, 739 F. Supp. 1496, 1502 (D.Utah, 1990) (same); Spartacus Youth League, 502 F.Supp. 789 (N.D.Ill.1980) (same).

Privity, within the meaning of the doctrine of collateral estoppel, does not exist merely because a person happens to be interested in the same question, or in proving or disproving the same state of facts. Clemmer v. Hartford Ins. Co., 22 Cal.3d 865, 874 (1979). It is not enough that both the State of California and respondent Miller were interested in proving that probable cause existed to make the arrests and conduct the search and seizure. "Privity within the meaning of the doctrine of issue preclusion is privity as it exists in relation to an identity of interests in the subject matter of the litigation." Id.

The interests of the State of California in the underlying criminal proceedings were not identical to those of respondent Miller. Wyler v. United States of America, 725 F.2d 156 (2d Cir. 1983) (collateral estoppel improper where DEA agents were not parties to the criminal proceeding because the interests of prosecutors in a criminal proceeding are not identical to those of individual officers); Davis v. Eide, 439 F.2d 1077, 1078 (9th Cir.1971) (same). In a different context, this Court has noted: "'The purpose of a criminal court is not to provide a forum for the ascertainment of private rights. Rather it is to vindicate the public interest in the enforcement of the

criminal law while at the same time safeguarding the rights of the individual defendant.'" United States v. Standefer, 447 U.S. 10, 25, 64 L. Ed. 2d 689, 100 S. Ct. 1999 (1980) (quoting United States v. Standefer, 610 F.2d 1076, 1093 (3rd Cir. 1979) (defendant accused of aiding and abetting in commission of criminal offense may be convicted despite the prior acquittal of the alleged perpetrator)).

Only the State of California, not respondent Miller, had an interest in the outcome of the criminal prosecution; Miller's personal interests were not at stake. Schwab v. Wood, 767 F.Supp. 574 (D.Del.1991) (police officers did not have an interest which was bound by the previous criminal proceedings; they simply had no direct personal interest whatsoever in the state criminal proceedings); Griffin v. Strong, 739 F.Supp. 1496 (D.Utah 1990) (same).

Petitioners, seeking to find privity by the use of generalization, conclude that since the prosecutor, the Attorney General's Office, and the respondents were agents of the State of California and had an interest in protecting the public from petitioners, they were in privity. Respectfully, that logic would place the Governor, the Legislature, the public prosecutors, the Attorney General's Office, and any agency devoted to the protection of the public from criminals in privity as they represent state agencies and have an interest in protecting the public from criminal elements. In this case, the prosecutor from Kern County and the Attorney General's Office of necessity had their own

agenda in selecting the cases to prosecute, determining how to marshal and present the evidence, and whether to seek review of a potentially erroneous decision issued by the Court of Appeal. Both the prosecutor and the Attorney General's Office exist in a time of limited resources with crushing workloads and must set their own agendas independent of the police officers who worked on the case, effected the arrests, and testified at the criminal proceedings. There is absolutely no indication in this record the prosecutor or the Attorney General's Office were aware of or had any interest in furthering the officers' interests. To find privity for purposes of collateral estoppel on this record is to simply create it out of thin air.

Petitioners rely on People v. Sims, 32 Cal.3d 468 (1982) for the proposition that under California law governmental bodies and their officers are in privity for purposes of collateral estoppel. In Sims, a welfare recipient who had been exonerated of fraud charges in an administrative hearing conducted by the Department of Social Services of Sonoma County was subsequently prosecuted in a criminal proceeding for the same alleged misconduct. The issue presented in Sims was whether the Sonoma County District Attorneys' Office, which represented the party to be estopped, and the Social Services Department, the unsuccessful party in the prior litigation, were sufficiently close to warrant applying collateral estoppel. The court reasoned that they were because both entities were county agencies that represented the

interests of the State of California at the respective proceedings[4]. Thus, Sims is distinguishable because it simply involved the relationship between two governmental bodies closely associated with regard to the prosecution of the same alleged misconduct. This case presents an entirely different issue of the relationship between the State of California, acting in the public interest in a criminal proceeding, and a state police officer who is a witness in that proceeding.

More to the point, however, is People v. Meredith (1992) 11 Cal.App.4th 1548. Meredith was initially charged in the United States District Court with possession of cocaine base with intent to distribute (21 U.S.C. @ 841 (a)(2)). That charge was dismissed after the district court ruled that the evidence against Meredith had been obtained in violation of Meredith's rights under the Fourth Amendment. When Meredith was subsequently charged with state offenses, he moved under Penal Code section 1538.5 to suppress

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4. Moreover, it should be noted that Vehicle Code §§ 13353-59 were enacted in "reaction to People v. Sims, supra, 32 Cal.3d 468, which held that the results of administrative hearings could preclude criminal prosecution for welfare fraud. The Sims result was itself a policy decision, but one informed by the "unique statutory scheme" at issue there.... If, today, a defendant were to argue that a favorable administrative outcome collaterally estopped a criminal prosecution, and cited Sims to support the contention, the contrary legislative enactment would clearly prevail." Gikas v. Solin (1993) 6 Cal.4th 841, 851.

the evidence against him. The trial court denied the suppression motion.

On appeal from his conviction after a negotiated plea of guilty to one count of possession of cocaine base for sale, he argued that the People of the State of California were barred by collateral estoppel from relitigating the issues relating to the legality of his arrest. Privity, he argued, existed between the United States and the People of California, because the Los Angeles Police Department "represented the rights of the government, both state and federal" in both proceedings. The court rejected defendant's argument, reasoning:

> "This argument fails to appreciate that it was the United States Attorney and the District Attorney of Los Angeles County, not the police, state or federal, who had the authority to prosecute Meredith in behalf of their respective sovereigns, to determine how assiduously to press the prosecution, and to decide on the strategy to be used in the prosecution. (Gov. Code, @ 26501; People v. Gephart, supra, 93 Cal.App.3d at p. 999; Rosato v. Superior Court (1975) 51 Cal.App.3d 190, 226 [124 Cal.Rptr. 427]; U.S. v. Davis, supra, 906 F.2d at p. 834.)

Further, collateral estoppel was improper because respondent Miller clearly had no control over nor did he substantially participate in the control of the State's

presentation of its case. Petitioners assert, for example, that respondent Miller was represented by the state prosecutor throughout the criminal trial. That assertion is not supported by the facts. The prosecutor represented the State of California -- not Miller. Also, respondent Miller was not represented by his own attorney, and petitioners have made no showing that the prosecutor had the same interest(s) as Miller did, or that Miller played any role in any decision as to the criminal case, or even that he was capable on his own, without legal advice, to make appropriate decisions in regard to the determination of the Fourth Amendment issues.

Miller's role at the criminal trial was simply that of a witness for the prosecution. Miller had no opportunity to engage in any discovery, or assert any defense which could shield him from civil liability. For example, respondent Miller could not divulge the name, or all of the information provided to him by the confidential informant, which the prosecutor wanted withheld[5]. Also, respondent Miller could not have appealed the state appellate court's decision on the issue of probable cause and he had no control over the Attorney General's Office decision not to appeal the decision to the California Supreme Court. Thus, to assume that respondent Miller, merely because he was

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5. The confidential informant's name, and all of the information he provided law enforcement, were revealed at the civil trial.

a witness at the earlier criminal proceedings, could litigate therein the probable cause issue is fallacious.

Since at least two of the four basic requirements for the doctrine of collateral estoppel cannot be satisfied, the Court of Appeals properly upheld the District Court's decision not to prevent respondent Miller from relitgating the probable cause issue[6].

B. **Judicial Notice**

Petitioners argue, without resort to concepts of collateral estoppel or res judicata, that the facts stated in the state unpublished appellate court's opinion concerning what transpired prior to the petitioners' arrest should have been judicially noticed, and removed from dispute at trial because for evidentiary purposes they were indisputably true. Petitioners' argument has no merit for several reasons.

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6. Finally, assuming arguendo that petitioners are correct, and that the District Court should have foreclosed respondent Miller from relitigating the issue of probable cause, Miller was still entitled to present at trial evidence in support of his qualified immunity defense. Based upon that evidence, the jury resolved questions of fact, and the District Court found that respondent Miller was entitled to qualified immunity because a reasonable officer could have believed petitioners' arrest to be lawful, in light of clearly established law and the information respondent possessed. Petitioners do not challenge this finding. Thus, even if the District Court erred in not applying collateral estoppel, the verdict in favor of respondent Miller must still be affirmed.

First, Fed. R. Evid. 201(b) provides:

> "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

Apparently, the petitioners believe that the findings made by the California Court of Appeals in its unpublished opinion fall into the latter category. A court, however, may take judicial notice of a document filed in another court "not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings." Kramer v. Time Warner Inc., 937 F.2d 767, 774 (2d Cir. 1991) (citing United States ex rel. Geisler v. Walters, 510 F.2d 887, 890 n.4 (3d Cir. 1975); Liberty Mutual Ins. Co. v. Rotches Pork Packers, Inc., 969 F.2d 1384 (2nd Cir. 1992) (court may take judicial notice of a document filed in another court, but not for the truth of the matters asserted therein). Here, petitioners wanted the District Court to rely upon the unpublished "Opinion" precisely to establish facts asserted therein, i.e., "Who did what to whom, when and why?" Petition 11.

Second, petitioners' argument overlooks an essential fact, namely that the unpublished opinion could not have been relied on by the District Court because none of the exceptions of Cal. R. of Court 977 applied. That section provides:

> "(a) An opinion of a Court of Appeal or an appellate department of the superior court that is not certified for publication or ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in sub.(b).
>
> (b) (1) when the opinion is relevant under the doctrines of the law of the case, res judicata, or collateral estoppel; or (2) when the opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceeding.

Finally, in Sosinsky v. Grant (1992) 6 Cal.App.4th 1548, 1563-69, 8 Cal.Rptr.2d 552, the court refused to

take judicial notice of the truth of facts asserted in findings of fact made by another court[7]:

> "While we have no quarrel with the fact that a judge, after hearing a factual dispute between litigants A and B, may choose to believe A, and make a finding of fact in A's favor, and while we have no quarrel that at some subsequent time it may be proper to take judicial notice that the judge did in fact make that particular finding in favor of A, the taking of judicial notice that the judge made a particular factual finding in favor of A is a far cry from the taking of judicial notice that the "facts" found by the judge must necessarily be the true facts, i.e., must necessarily be "the truth."... Indeed, if A's testimony consisted of "facts...that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy" (Evid. Code, § 452, subd. (h)), there

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7. Although Sosinsky is not binding on this Court, its analysis of the issue is well reasoned, and more importantly, consistent with the provisions of Fed. R. Evid. 201(b) concerning judicial notice.

> would have been no need for a trial on the dispute between A and B in the first place.... Taking judicial notice of the truth of a judge's factual finding would appear to us to be tantamount to taking judicial notice that the judge's factual finding must necessarily have been correct and that the judge is therefore infallible. We resist the temptation to do so."

In light of the foregoing, the Court of Appeals properly upheld the District Court's decision not to take judicial notice of the truth of the facts stated in the unpublished California Court of Appeal's opinion.

C. **Conclusion**

This case does not merit further review by this Court. For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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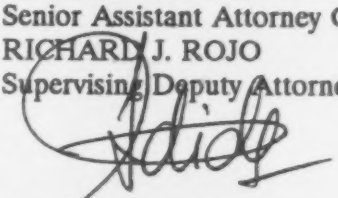

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